Supreme Court, U. S.
FILED
MAY 28 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1976

No. 75-1733

SALLY LEE SIMON, *Petitioner*

v.

CHARLES SIMON, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Statements of the Questions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	6
Conclusion	17
Appendix:	
Final Judgment Dissolving Marriage	A1
Order on Motion to Dismiss	A8
An Interlocutory Appeal from the Circuit Court for Dade County, General Jurisdiction Division, Major B. Harding, Judge. (Opinion filed April 2, 1974)	A11
Summary Final Judgment for Plaintiff	A14
An Appeal from the Circuit Court for Dade County, Major B. Harding, Judge. (Opinion filed July 29, 1975)	A17
Order from The District Court of Appeal, Third District, (Thursday, September 11, 1975)	A18
Order from the Supreme Court of Florida (Wednesday, March 10, 1976)	A19

TABLE OF CITATIONS

Cases:	Page
Barker v. Barker, 331 P.2d 628 (Calif.) 1958)	10
Fall v. Easton, 215 U.S. 1 (1909)	7, 8, 16
Fogel Refrigerator Co. v. Oteri, 398 Pa. 82 (1960)	13
Haefele v. Davis, 399 Pa. 504 (1960)	13
Hanson v. Denckla, 357 U.S. 257 (1958)	15, 16
Healey v. Bowman, 217 Pa. 293 (1921)	13
Killion v. Wright, 34 Pa. 91 (1859)	13
McRary v. McRary, 47 S.E. 2d 27 (N.C. 1948)	10
Parks v. Pennsylvania Clay Co., 60 Pa. Super. 567 (1915)	13
Reading Co. v. Spink, 263 Pa. 445 (1919)	13
In Re: Reynold's Will, 85 N.W. 2d 553 (N.D. 1957)	14
Shapiro v. Shapiro, 424 Pa. 120 (1966)	11
Sharp v. Sharp, 166 Pac. 175 (Okla. 1916)	8, 9, 10
Simon v. Simon, 293 So.2d 780 (1974)	1, 5
Simon v. Simon, 317 So.2d 83 (1975)	1, 5
Steelman v. Sites' Executors, 35 Pa. 216 (1859)	13
Other Authorities:	
RESTATEMENT OF JUDGMENTS	13, 14
RESTATEMENT, SECOND, *Conflict of Laws*	14
United States Constitution Article IV, Section 1, Fourteenth Amendment	12

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINIONS BELOW

The opinion of the District court of Appeals of Florida, Third District, which reversed the Order of Judge Major B. Harding, Circuit Court, Dade County, and held the parties' rights to the property in Pennsylvania were adjudicated as a matter of law, is reported at 293 So.2d 780 (1974) (table) and appears at page A11 of the appendix to this petition. The opinion of the District Court of Florida, Third District, affirming the Summary Final Judgment order issued by Judge Major B. Harding, Circuit Court, Dade County, is reported at 317 So.2d 83 (1975) (table) and appears at page A17 of the appendix to this petition.

JURISDICTION

The judgment of the District Court of Appeals of Florida, Third District, was entered on July 29th, 1975; a timely Petition for Rehearing was denied on September 11, 1975, and a timely Petition for Writ of Certiorari was denied by the Florida Supreme Court on March 10th, 1976. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

STATEMENT OF THE QUESTIONS INVOLVED

I. Can the courts of Florida utilize a judgment entered by operation of law not on the merits which directly affects title to real estate in Pennsylvania, by an extension of its *in personam* jurisdiction, in contravention of prior doctrine established by the United States Supreme Court, for the purpose of denying the petitioner the right to continue actions in Pennsylvania asserting claims to real estate situate therein?

II. Can the said Florida judgment, obtained by operation of law, be the basis for enjoining the petitioner from continuing her law suits in the State of Pennsylvania where it appears that under the legal principles in the State of Pennsylvania, the said judgment would not be accorded full faith and credit because it was not obtained on the merits, purports to affect the title to real estate directly contrary to the doctrine established by the United States Supreme Court and the conveyances in Pennsylvania are by a husband and wife to husband and others without consideration and the wife's signatures to the deeds in question were forged?

III. Can the said judgment be made effective to determine the title to the real estate in Pennsylvania and by its injunctive powers restrain and prohibit the petitioner from continuing her law suits in Pennsylvania where the judgment resulting from operation of law in Florida is contrary to the Pennsylvania Public Policy?

STATEMENT OF THE CASE

This petition seeks review of the decision of the Florida District Court of Appeals, 317 So.2d 83 (1975), which affirmed a lower court order enjoining petitioner and depriving her of her right to continue to assert in the courts of Pennsylvania, her claims to Pennsylvania real property, which under the existing facts and applicable federal and state law, would not accord full faith and credit to the said judgment. The Florida Supreme Court on March 10, 1976, denied a Petition for a Writ of Certiorari.

The Petitioner, Sally Lee Simon, was, at various times in 1969, a tenant by the entireties, with her then husband, Charles Simon, of a variety of real property located in Philadelphia, Pennsylvania, valued in excess of $4,000,000 (accruing annual income in excess of $400,000). She was divested of her interest by deeds naming her and her husband as grantor and her husband and others as grantees. Her signatures on the deeds were forged. There was also no consideration paid to her in said conveyances and the deeds so recite.

In late 1971, the petitioner instituted several actions in the Court of Common Pleas of Philadelphia County against Charles Simon and others seeking to recover her interest in the Pennsylvania real estate consisting of shopping centers and apartment house projects and an accounting of the accruals therefrom which has been collected and retained by Charles Simon.

In four of the principal actions pending in the Court of Common Pleas of Philadelphia County, Charles Simon alleged as the basis for successive motions for judgments on the pleadings the entry by the Florida courts of the judgment for which review is being sought. On March 14, 1975, the court denied the successive motions of Charles Simon for judgment on the pleadings predicated on the said Florida judgment. Subsequently, a Petition for Reconsideration was granted and on November 17, 1975,

further proceedings in that connection were stayed pending a final determination of the Florida litigation.

The various Florida proceedings have developed as follows:

On December 27, 1968, petitioner filed a Complaint in Divorce in the Circuit Court of Dade County, Florida. After a brief reconciliation in 1969, the action was reactivated and on April 14, 1970, Charles Simon filed a Counterclaim against the petitioner.

Subsequently, Charles Simon attempted to amend his pleadings to bring into issue, in the Florida proceeding, the property rights of the parties to the aforementioned Pennsylvania real estate. The petitioner opposed these efforts, contending, *inter alia,* these issues were being fully litigated in the Pennsylvania courts. The Florida trial court disallowed the amendment as untimely and directed that the case proceed to final judgment without an adjudication of those property rights.

On March 20, 1972, the Florida court entered a Final Judgment Dissolving the Marriage and adjudicated only the Florida real estate then owned by the parties. (A1)

On October 24, 1972, Charles Simon filed a Complaint for Injunction in the Circuit Court in Broward County, Florida. He sought to enjoin petitioner from continuing the Pennsylvania actions to recover her interests in Pennsylvania real property. Mr. Simon claimed he was suffering irreparable injury as a result of the Pennsylvania law suits, and the property rights to the Pennsylvania real estate which petitioner asserted in these actions were finally and conclusively settled and determined by operation of law under the aforesaid judgment.

The power of the Florida court in extending its *in personam* jurisdiction and directly effecting the title to the real estate in Pennsylvania in contravention of the applicable decisions of this Court, came about in the following manner.

The Complaint for Injunction was transferred to the Dade County Circuit Court and assigned to Honorable

Major B. Harding, who had presided over the divorce proceedings. Judge Harding struck those allegations of the Complaint for Injunction which asserted that the claims to property in Pennsylvania were adjudicated in the divorce action holding that:

> "Inasmuch as the ownership or property rights of the parties was the subject of actions pending in the Pennsylvania courts at the time of the final judgment of dissolution of marriage hereinabove referred to, this court does not deem it appropriate to determine whether said judgment divested the Pennsylvania court of its jurisdiction or otherwise acted as a bar to further proceedings there."

Judge Harding's order striking those allegations, was appealed by Charles Simon. The District Court of Appeals reversed, holding that by operation of law, all property rights of the parties were conclusively determined by the divorce decree in spite of the fact that the parties were litigating some of those claims in the Pennsylvania courts at the time the decree was entered. 293 So.2d 780 (1974).

On the basis of this reversal and remand, the trial court entered a Summary Final Judgment in favor of Charles Simon on October 24, 1974, permanently enjoining the petitioner from prosecuting all actions then pending in the Court of Common Pleas of Philadelphia County claiming an interest in the Pennsylvania property formerly owned by the parties as tenants by the entireties and now by Charles Simon, based on facts or circumstances which existed prior to March 20, 1972, the date of the final divorce decree.

The summary judgment injunction was appealed to and affirmed by the District Court of Appeals of Florida, Third District, 317 So.2d 83 (1975).

A timely petition for rehearing was denied. Petitioner filed a petition for writ of certiorari in the Florida Supreme Court, which was denied on March 10, 1976.

The issues involved herein were raised in the Florida proceedings.

This petition followed.

REASONS FOR GRANTING THE WRIT

I. (a) The Florida anti-suit injunction contravenes the prior decisions of this Court which restricted the power of a state Court to annul a deed or to establish a title beyond the borders of its jurisdiction by a direct decree.

(b) Under the facts and applicable legal principles, the Pennsylvania court would not give full faith and credit to the Florida judgment.

(c) Petitioner is being deprived of her right to establish the Florida judgment is not *res judicata* in her proceedings in Pennsylvania.

The anti-suit injunction, which is the subject matter of this petition, was issued by the Florida trial court in a summary judgment proceeding. The injunction was issued without an opportunity for petitioner to answer the complaint for injunction on the merits.* The trial court specifically held that it was authorized to issue the injunction because, as a matter of law, "the Final Judgment Dissolving Marriage of the parties, aforesaid, *was by operation of law a bar to the seven actions* described in [Charles Simon's] complaint *instituted by* [petitioner] against [Mr. Simon] *in the courts of the State of Pennsylvania*, in

*The portions of the complaint on which the trial court relied in issuing the injunction were originally stricken by that court. When they were reinstated by order of the District Court of Appeals, petitioner sought leave to amend her answer to the complaint to respond to those allegations. Without allowing the amended answer, the trial court granted summary judgment in favor of Charles Simon and issued the injunction.

which she claimed special equities and other property rights in the separate property of [Charles Simon] located in that state." (emphasis added)

This decision was affirmed by the District Court of Appeals.

II. (a) The Florida court in projecting in Pennsylvania the force of the divorce decree by means of extending its *in personam* jurisdiction, will deprive the petitioner of the right to establish, in Pennsylvania, the said judgment is bereft of full faith and credit in Pennsylvania.

(b) The Florida divorce decree on which is superimposed the injunction, as interpreted by the Florida courts, is one which directly affects title to Pennsylvania real estate and, as such, is not entitled to recognition by the Pennsylvania courts as established by the doctrine enunciated by the United States Supreme Court.

(a) The landmark decision which defines the outer parameters of the power of a court in one state to decide title to real property located in another state, is *Fall v. Easton*, 215 U.S. 1 (1909).

In *Fall*, a husband and wife were divorced in the State of Washington. At the time of the divorce, the spouses owned a piece of real estate in Nebraska. In the divorce case, the husband claimed the property was his alone, the wife claimed that it was community property, and asserted a claim to be declared sole owner. Washington State law directed a court, in granting a divorce, to "make such disposition of the property of the parties as shall appear just and equitable. . . ." The Washington court found in favor of the wife as to the Nebraska real estate and appointed a commissioner to execute a deed to her. The husband, meanwhile, sold the property to Eastin and a deed to that effect was recorded. The wife then brought an action to quiet title in Nebraska.

This Court held that the Washington decree was not entitled to full faith and credit, since it purported to *directly affect* title to real estate in Nebraska:

> "The territorial limitation of the jurisdiction of courts of a state over property in another state has a limited exception in the jurisdiction of a court of equity, but it is an exception well defined. A court of equity, having authority to act upon the person, may *indirectly act upon real estate* in another state, through the instrumentality of this authority over the person." *Id.* at 8. (Emphasis added)

However, while the Florida court seeks to exercise its *in personam* jurisdiction, it is, in effect, implementing a decree by which it directly effected the title to the Pennsylvania real estate.

Most of the cases which have arisen in this area since *Fall*, involve an attempt by the foreign court to bring about some change in record ownership. In such cases, the distinction between direct and indirect normally turns on the precise manner in which the foreign court seeks to bring about this change. Thus, a decree is indirect (and hence valid) if it simply acts upon the party; that is, it orders the party to transfer the property to the other spouse and such a transfer is accomplished by the party pursuant to the order. A decree is direct (and hence invalid) if it purports to operate thru the force of the judgment automatically, or through an instrumentality of the court, such as a commissioner.

In the present, case, the petitioner asserts claims to parcels of real estate which are, at the present time, titled in the name of Charles Simon and others. The effect of the Florida divorce decree is to extinguish, forever, the petitioner's claims. The Florida judgment is projected into Pennsylvania, and by its force seeks to determine directly the title to the Pennsylvania real estate.

In *Sharp v. Sharp*, 166 Pac. 175 (Okla. 1916) (citing *Fall v. Easton, supra*), the parties were divorced in Oregon. In the divorce proceedings, the wife, Jennie Sharp, claimed an interest in a parcel of Oklahoma real estate which was *titled* in the name of the husband, Landis Sharp.

The decree of the Oregon court stated:

> "That plaintiff, Landis Sharp is the owner of [the Oklahoma real estate], free from all right, title, interest, estate and claim forever of defendant, Jennie Sharp;"

Landis Sharp later brought suit in ejectment in Oklahoma seeking recovery of the real estate in question. He introduced the records of the Oregon proceedings and on that basis alone the trial court found in his favor. However, the Supreme Court of Oklahoma reversed.

The husband claimed the decree of the Oregon court was *res judicata* and the Oklahoma court said:

> "This argument has some force, but nevertheless it seems that the decree of the Oregon court does in fact, not through any act required of the person, Jennie Sharp, *but through the force of the decree itself*, determine the validity of the asserted rights of Jennie Sharp in and to the real estate, and thus, *not indirectly but directly, affects the title or status of lands in Oklahoma*. Otherwise of what force is the decree when introduced in the instant case. Jennie Sharp is asserting an equitable title to the Orchard Park property. To meet this assertion Landis Sharp introduces the record of the Oregon decree, claiming that it bars Jennie Sharp's asserted rights. Its effect, so taken, is to establish Landis Sharp's title, yet this is the very thing which the Supreme Court of the United States in *Hart v. Sansom*, supra said a court of equity could not do.
>
> 'But in such a case, as in the ordinary exercise of its jurisdiction, a court of equity acts in per-

sonam, by compelling a deed to be executed or canceled by or in behalf of the party. *It has no inherent power, by the mere force of its decree, to annul a deed, or to establish a title.*'

"We conclude, therefore, that the effect of the Oregon decree, in so far as it related to the real estate, was to establish the title to lands in Oklahoma, and thus far *it was beyond the jurisdiction of that court coram non judice, and void.*" 166 Pac. at 178. (Emphasis added)

For additional decisions similar to *Sharp*, see, e.g., *Barker v. Barker*, 331 P.2d 628 (Calif. 1958); *McRary v. McRary*, 47 S.E. 2d 27 (N.C. 1948).

Petitioner contends the *Sharp* analysis is correct. A decree which purports to *recognize* title in one party, although an actual *transfer* of title is not accomplished because that party already holds *record* title, is a decree which *directly* affects title to real estate and is beyond the power of the issuing court.

The Florida courts are now giving to their divorce decree an effect not sanctioned by the foregoing decision. A decision by this Court to grant certiorari will be of substantial assistance to the state and federal courts in their efforts to correctly interpret a leading decision of this Court and put at rest the determination of a substantial constitutional question. It will effect, not only Sally Lee Simon, but property owners and claimants throughout the United States.

(b) The absence of consideration in the conveyance in itself denies any title to Charles Simon under Pennsylvania law.

Assuming arguendo that the transfer of the property from Sally Simon to Charles Simon was valid and not based on a fraudulent transfer of the property by Sally Simon's forged signature, Pennsylvania law cogently dictates the transfer of Sally Simon's property to her husband created a rebuttable presumption of a trust in her favor. In a leading Pennsylvania case, *Shapiro v. Shapiro*, 424 Pa. 120 (1966), the Supreme Court, in its rigorous analysis of the issue, commented at page 128-129 as follows:

"Our case law on this subject is well settled. As stated in *Darlington's Appeal*, 86 Pa. 512, 528 (1878) —a landmark decision—: 'A transaction between persons so situated [as wife and husband] is watched with extreme jealousy and solicitude, and if there be found the slightest trace of undue influence or unfair advantage, redress will be given to the injured party.' The Court went on to state that: 'Owing to the near connection between the parties . . . , the transaction in itself is considered so suspicious as to cast the burden of proof upon the person who seeks to support it, to show that he has taken no advantage of his influence or knowledge, and that the arrangement is fair and conscientious.' (at p. 518). *Moreover, where a husband obtains his wife's property without adequate consideration, a rebuttable presumption arises that a trust is created in her favor*, and, if the husband claims a benefit arising from the transaction, he must *show affirmatively* that he acted in good faith and took no undue advantage of his wife: *DeBarnard v. DeBernard*, 384 Pa. 194, 196-197, 120 A.2d 176 (1956)." (Emphasis supplied)

It is patent from a review of the proceedings in Pennsylvania, which the Florida decree seeks to enjoin Sally Simon from pursuing, that Sally Simon's right, title and interest to various parcels of real estate holdings in Philadelphia were taken without any compensation of any kind whatsoever to her. In view of the above cited Pennsylvania case authority, the enforcement of the Florida decree for this reason alone is unconscionable and will not be en-

titled to "Full Faith and Credit" pursuant to Article IV, Section 1, of the Constitution.

C. Judgments in foreign states not on the merits or where an issue is withdrawn by the first court, cannot act as *res judicata* to claims in Pennsylvania.

It is particularly appropriate and important to note the following pertinent part of the Opinion of trial Judge Harding issued on October 16, 1973: (A8)

> "In the dissolution proceeding the husband, (Plaintiff here), sought to have property rights of the parties to the Pennsylvania property litigated and made a part of the final judgment of dissolution of marriage. These efforts were resisted by the wife, (Defendant here), and the court, by order refusing to permit the amendment to pleading for not being timely filed, permitted and directed the matter to proceed without an adjudication thereof in the final judgment. Both parties, here and there, were well aware that failure to adjudicate these property rights in a final judgment dissolving a marriage might bring into effect an adjudication thereof by operation of law.
>
> "In said dissolution action, the undersigned having rendered said judgment, the Pennsylvania property for the purposes of the dissolution was conceded to be in the name of the husband. (Plaintiff here). It was also known to the court that there was, as alleged in the Plaintiff's complaint in the instant cause, pending the actions in the Pennsylvania courts relative to the interests of the parties therein.
>
> "The court, in the dissolution action, *did not have the property rights of the parties to the property in Pennsylvania before it as an issue to be determined by final judgment.* Therefore, the final judgment did not adjudicate those property rights except as they may be adjudicated by operation of law." (emphasis added)

Under these circumstances, several interrelated principles operate to make the claim of res judicata inapplicable to Pennsylvania cases, notwithstanding the result that apparently would obtain if these were cases that *involved Florida real estate.*

The following two sections from the RESTATEMENT OF JUDGMENTS would appear applicable to the present situation:

> "§49. Judgment for Defendant Not on the Merits.
>
> Where a valid and final personal judgment not on the merits is rendered in favor of the defendant, the plaintiff is not thereby precluded from thereafter maintaining an action on the original cause of action and the judgment is conclusive only as to what is actually decided.
>
> "§67. Where First Court Makes Erroneous Ruling that Recovery Can Be Had Only in a Different Action.
>
> Where in an action the court holds that the plaintiff cannot enforce a particular claim in that action on the ground that he can enforce it only in a separate action, the judgment does not preclude the plaintiff from enforcing the claim in another action, although in the second action it appears that the holding of the court in the first action was erroneous."

Substantial judicial support for these principles exists in Pennsylvania. See, *e.g., Killion v. Wright,* 34 Pa. 91 (1859); *Steelman v. Sites' Executors,* 35 Pa. 216 (1859); *Healey v. Bowman,* 271 Pa. 293 (1921); *Fogel Refrigerator Co. v. Oteri,* 398 Pa. 82 (1960) ("Courts should not be astute to close their doors upon the merits"); *Haefele v. Davis,* 399 Pa. 504 (1960); *Reading Co. v. Spink,* 263 Pa. 445 (1919), and *Parks v. Pennsylvania Clay Co.,* 60 Pa. Super. 567 (1915).

It is clear from the Opinion of Judge Harding that he "directed the matter to proceed without an adjudication

[of the claims to the Pennsylvania real estate] in the final judgment." It would be unconscionable for the plaintiff to now be barred from raising her substantial claims by reason of the failure of the Florida trial judge to consider those claims especially where petitioner's request to amend her answer was denied. (See footnote at page 6.)It is submitted the application of section 67, RESTATEMENT OF JUDGMENTS, supra, is designed to prevent such a manifest injustice.

D. The doctrine applied by the Florida Court by operation of law is repugnant to Pennsylvania policy.

The RESTATEMENT, SECOND, *Conflict of Laws*, §103 states:

> "A judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State."

One recognized area where foreign judgments are not entitled to full faith and credit involves judgments affecting title to realty outside the state where the judgment is rendered. *In Re: Reynold's Will*, 85 N.W. 2d 553 (N.D. 1957).

In the present case, there are two important and distinct policy issues involved. First, there is a difference between the laws of Florida and Pennsylvania concerning the requirements that property claims be adjudicated at the time of divorce. Florida law generally requires that property claims between spouses be determined at the time of a divorce. Pennsylvania law, on the other hand, is diametrically opposite. In Pennsylvania divorce proceedings, property claims between spouses may not be litigated; rather, such claims must be brought separately, without regard to the pendency of divorce proceedings, and they will proceed without regard to the divorce proceedings.

Florida courts have adopted the concept that all claims between spouses be litigated at one time. It is apparent Pennsylvania courts have no such policy.

The second policy consideration is based on the obvious fact that if Charles Simon's contention is sustained, Sally Simon will be deprived of substantial property rights without ever having had those rights considered, on the merits, by any court. Such a result would clearly constitute a deprivation of her property without due process of law. And, in this connection it is no answer to state she had her chance to raise these issues in Florida and by failing to do that has now forfeited her claims, especially where it appears the trial judge denied she might litigate the issues in question and subsequently refused an amendment for the issues to be framed.

It is the function of the United States Supreme Court to determine whether judgments are consistent with the Federal Constitution. Under the Due Process provisions of the Fourteenth Amendment, no citizen may arbitrarily be deprived of his property. Sally Simon's right, interest, and title to the property in Pennsylvania would be extinguished by the decree of the Florida court, which existence is solely a result of Florida operation of law. Moreover, the Florida decree is a violation of petitioner's constitutional guarantee pursuant to the Fourteenth Amendment, since her property rights are being directly affected by a decree which was by operation of law and not on the merits.

A case which may be considered with respect to the case *sub judice*, is *Hanson v. Denckla*, 357 U.S. 257, 78 S.Ct. 1228, 2 L.Ed. 2d 1283 (1958). The Supreme Court said:

> "Founded on physical power, *McDonald v. Mabee*, 243 U.S. 90, 91 37 S.Ct. 343, 61 L.Ed. 608, in rem jurisdiction of a state court is limited by extent of its power and by the coordinate authority of sister States.

> The basis of the jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum state . . ."
>
> "The Florida court held that the presence of the subject property was not essential to its jurisdiction. Authority over the probate and construction of its domiciliary's will, under which the assets might pass, was thought sufficient to confer the requisite jurisdiction. But jurisdiction cannot be predicated upon the contingent role of this Florida will."

The Supreme Court in Hanson determined the issue of in rem jurisdiction as follows:

> "The fact that the owner is or was domiciled within the forum State is not a sufficient affiliation with the property upon which to base jurisdiction in rem."

Also pertinent is the rationale of *Fall v. Eastin, supra,* where the Court held that one of the reasons the Nebraska court properly refused to give effect to the Washington decree was that, under Nebraska law (as in Pennsylvania), property rights cannot be determined in a divorce proceeding. See the language, quoted supra, at pages 9, 10.

CONCLUSION

For the foregoing reasons, it is urged that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

(Caption Omitted in Printing)

FINAL JUDGMENT DISSOLVING MARRIAGE

This action was heard before the Court. It was originally instituted by the Wife, as Plaintiff, on December 27, 1968, by the filing of a Complaint for divorce, alimony, custody of the minor children of the parties and the right to exclusive possession of the home of the parties, owned by them as tenants by the entireties. Her action was based upon an allegation of cruelty and temper. The Husband filed his Answer to the Complaint on January 14, 1969. Shortly thereafter the parties reconciled and resumed cohabitation for almost a year, until December 5, 1969, when the Wife, through new counsel, activated the proceedings.

On April 14, 1970, the Husband, pursuant to authority granted by the Court, filed a Counter-claim against the Wife alleging her adultery, cruelty and temper. That Counter-claim sought divorce and custody of the minor children and the sale of the home which was owned by the parties as a tenancy by the entireties. The Husband also pleaded condonation and reconciliation as affirmative defenses.

On May 1, 1970 the Wife filed her Answer to the Counter-claim. Thereafter on September 21, 1970 the Wife's Complaint for divorce, alimony and custody of the children was dismissed with prejudice, and that dismissal with prejudice was reiterated by Order dated October 9, 1970, but leave was granted to the Wife to file a supplemental complaint, alleging facts occurring subsequent to the reconciliation of the parties.

On October 12, 1970 the Wife filed an Amended and Supplemental Complaint, through new counsel, in which she sought a divorce, alimony, custody of the two minor children of the marriage and adjudication of her claim of property rights in various real properties and shopping centers in and around the City of Philadelphia, Pa. The Husband filed his Answer to that Amended And Supplemental Complaint in November, 1970.

On November 22, 1971, the Husband's Counter-claim was amended by adding to the prayer for relief a prayer that the Court determine the rights and interests of the parties in and to their real and personal property and that a partition of the real property located in Bay Harbor Island, Dade County, Florida, owned by them as a tenancy by the entireties, and the personal property contained therein, be adjudged.

On November 29, 1971, being 8 days before the date set for trial of the cause, the Wife, through new counsel, obtained an Order dismissing her Amended and Supplemental Complaint, and every count thereof, at her instance. That Order specifically preserved for adjudication the issues raised by Husband's counter-claim. In substitution of that dismissed Amended and Supplemental Complaint, the Wife then filed a Second Amended Complaint for Separate Maintenance, seeking permanent alimony without divorce, custody of the children and allowance for their support. Husband filed his Answer thereto. The action then proceeded to trial (with new counsel for the Wife), upon the Husband's dissolution of marriage) custody of the children, adjudication of the rights and interests of the parties in and to their real and personal property and partition of the Bay Harbor Island home and the personal property contained therein, and the Wife's prayer for separate maintenance and custody of the children. The action was tried on December 7, 1971 and continued on February 3 and 4, 1972. The Court heard and considered the testimony of the parties and their witnesses, and the exhibits received in evidence, and due consideration having been had, makes the following FINDINGS OF FACT:

1. This Court has jurisdiction of the subject matter and of the parties hereto.

2. *Both the Husband and Wife are permanent bona fide residents of the State of Florida, domiciled therein, and have resided in the State of Florida for more than 6 months before the filing of the pleadings herein.*

3. The marriage of the Husband, Charles Simon, and the Wife, Sally Simon, is irretrievably broken.

4. There are two minor children of the parties of whom Marla Simon, who is 15 years of age, resides with the Husband and Sheryl Simon, who is 4 years of age, resides with the Wife. The best interests of the children warrant the present continuation of the status quo with Marla remaining in the care, custody and control of the Husband and Sheryl remaining in the care, custody and control of the Wife, but with reasonable and liberal visitation afforded both parties to and with both children.

5. The parties own jointly, as tenants by the entireties, a home located in Bay Harbor Island, Dade County, Florida, the legal description of which is: Lot 34 and East ½ of Lot 35 in Block 23 of BAY HARBOR ISLAND, according to the Plat thereof as recorded in Plat Book 46 at Page 5 of the Public Records of Dade County, Florida, which is valued in excess of $200,000.00 subject to a mortgage having an approximate balance of $35,000.00. The furniture, furnishings and fixtures and equipment of that home are similarly owned by the parties as tenants by the entireties. In addition to his interest in that residence, and its contents, the Husband is the owner of a number of properties consisting of improved and unimproved real estate in Philadelphia, Pa., as designated and legally described in Plaintiff's Exhibit 1* filed in evidence, which was stipulated to have a net value in excess of $1,000,000.00. The Husband's income tax returns indicate actual income therefrom in excess of $20,000.00 after deducting depreciation. The testimony further showed that the properties are producing a gross "throw-off" of about $120,000.00 per year. Husband has been using the major portion of this sum to provide for himself and his family for the past 10 years.

6. The home of the parties is excessively large and costly to maintain for the occupancy of the Wife and the

4 year old child alone. It was originally purchased and used by the parties for occupancy of their family of eight, as it consisted at that time. The said property is indivisible and is not subject to physical partition without prejudice to the parties. Upon entry of this Final Judgment of Dissolution of Marriage their interest in that property will become that of equal tenants in common therein and the Husband entitled to partition thereof as prayed for in his counter-claim.

Whereupon, it is ORDERED, ADJUDGED and DECREED as follows:

1. The marriage of the parties hereto, to wit: Charles Simon and Sally Simon, is dissolve a vinculo because it is irretrievably broken.

2. (a) The custody of the minor child, Marla Simon, is awarded to the Husband, Charles Simon. The Wife, Sally Simon, shall have the right of reasonable visitation with Marla including the right to have Marla visit with the Wife, over weekends and holidays.

(b) The custody of the minor child, Sheryl Simon, is awarded to the Wife, Sally Simon. The Husband, Charles Simon, shall have the right of reasonable visitation with Sheryl Simon including the right to have Sheryl visit with the Husband, over weekends and holidays.

(c) Visitation by either parent with the child at or away from the home of the other parent, or by the child to the other parent for weekends or holidays shall be liberal and encouraged by both parents.

3. The Husband, Charles Simon, shall pay $1,250.00, per month to the Wife, Sally Simon, as alimony, commencing April 1, 1972 and on the first day of each and every month thereafter.

4. The Husband, Charles Simon, shall pay $325.00, per month as child support for Sheryl Simon, the minor child of the parties, commencing April 1, 1972 and on the

1st day of each and every month thereafter. In addition thereto the Husband shall pay the reasonable cost of her education.

5. (a) That the home of the parties and the furniture, furnishings and fixtures and equipment contained therein, located at 10330 W. Broadview Drive, Bay Harbor Island, Dade County, Florida, which is legally described as:

> Lot 34 and East ½ of Lot 35 in Block 23 of BAY HARBOR ISLAND, according to the Plat thereof recorded in Plat Book 46 at Page 5 of the Public Records of Dade County, Florida.

shall be sold by the parties as soon as possible after April 1, 1972, and the net proceeds of the sale shall be divided equally between the parties except that any balance remaining due on the mortgage encumbering that property shall be paid by the Husband.

(b) If the parties do not succeed in effecting such voluntary sale by October 1, 1972, then upon motion and affidavit of either party showing that said sale has not been made within the time limited, a supplemental judgment shall be entered herein directing the Clerk of the Court to sell the said property at public sale on a specified day, not less than 10 nor more than 30 days thereafter, to the highest bidder in cash, except as hereinafter set forth, at the South Door of the Courthouse in Dade County, Florida, in accordance with §45.031, Florida Statutes.

(c) The Husband, Charles Simon, shall advance all subsequent costs of this action and shall be reimbursed for them by the Clerk if he is not the purchaser of the property at the sale. If the Husband is the purchaser, the Clerk shall credit the Husband's bid with 50% of the costs advanced by him or thereafter accruing and with 50% of the total amount of his bid, except that any balance due on a mortgage encumbering said property shall be paid by the Husband or charged against his share of the pro-

ceeds of the sale. If the Wife is the Purchaser, the Clerk shall credit the Wife's bid with 50% of the amount of her bid.

(d) On filing a Certificate of Title the Clerk shall distribute the proceeds of the sale, so far as they are sufficient, by paying:

(1) All costs advanced by the Husband in connection with the sale;
(2) Documentary stamps affixed to the Certificate;
(3) 50% of the net proceeds of the sale shall be paid to the Wife, without charging her share for the balance due on any mortgage encumbering the property;
(4) The remaining 50% of the net proceeds of the sale, minus such amount as is due for payment of any outstanding mortgage encumberance on the property, shall be paid to the Husband;
(5) The balance due on such mortgage as may encumber the property shall be paid and satisfied.

It is the intent of this paragraph that the Husband shall be charged with the obligation to pay off any balance due under the mortgage encumbering the property, with all costs of the sale to be borne equally by the parties and that the net proceeds of the sale, after satisfying the mortgage indebtedness by the Husband, shall be divided equally between the parties.

(e) On filing the Certificate of Title the purchaser at the sale shall be let into possession of the property.

(f) Jurisdiction of this action is retained to enter such further Orders or supplemental judgments as are proper or necessary to effectuate the partition of said property, including, without limitation, supplemental judgment of partition and Writs of Assistance.

6. Attorneys, Stephen Butter, Esq., 420 Lincoln Road, Miami Beach, Florida, 33139, William John Mason, Esq.,

450 Seybold Building, Miami, Florida, 33132 and S. Blair Ross of 1497 N.W. 7th Street, Miami, Florida, 33125, are given notice hereby that any application that they may see fit to make with respect to claim by them, or any of them for counsel fees in this cause shall be submitted to this Court in writing on or before April 15, 1972. The original of such application shall be submitted by mailing the same to Honorable Major B. Harding, Circuit Court Judge, 200 Duval County Courthouse, Jacksonville, Florida, and mailing a copy of such application to the Husband's attorney, Jack D. Burris, Esq., 420 Lincoln Road, Miami Beach, Florida, 33139. The Husband shall have 10 days after receipt of such application to file a written response thereto. Jurisdiction of this action is retained to enter such further Orders or supplemental judgments as are proper or necessary to adjudicate the claims for attorneys' fees, if any, so filed by said attorneys, and the pending claim, heretofore submitted and pending herein by Richard L. Lapidus, Esq.

7. The Wife's Second Amended Complaint for Separate Maintenance be and it is hereby dismissed.

8. This Court retains jurisdiction of this cause for the purpose of making such further Orders with respect to the care, custody and support of the minor children of the parties as, from time to time, will seem proper in equity and good conscience.

DONE AND ORDERED in Chambers at the Court House, at Jacksonville, Duval County, Florida, this 20th day of March, 1972.

/s/ Major B. Harding
Circuit Judge

(Caption Omitted in Printing)

ORDER ON MOTION TO DISMISS

The Plaintiff seeks to enjoin the Defendant from proceeding in certain actions in the courts of Pennsylvania relative to the property rights of the parties in certain property allegedly owned by the Plaintiff in the State of Pennsylvania. The parties were at one time married and their marriage was dissolved in the Circuit Court in and for the Eleventh Judicial Circuit, in and for Dade County, Florida, case number 68-19724.

In the dissolution proceeding the husband, (Plaintiff here), sought to have property rights of the parties to the Pennsylvania property litigated and made a part of the final judgment of dissolution of marriage. These efforts were resisted by the wife, (Defendant here), and the court, by order refusing to permit the amendment to pleading for not being timely filed, permitted and directed the matter to proceed without an adjudication thereof in the final judgment. Both parties, here and there, were well aware that failure to adjudicate these property rights in a final judgment dissolving a marriage might bring into effect an adjudication thereof by operation of law.

In said dissolution action, the undersigned having rendered said judgment, the Pennsylvania property for the purposes of the dissolution was conceded to be in the name of the husband, (Plaintiff here). It was also known to the court that there was, as alleged in the Plaintiff's complaint in the instant cause, pending the actions in the Pennsylvania courts relative to the interests of the parties therein.

The court, in the dissolution action, did not have the property rights of the parties to the property in Pennsylvania before it as an issue to be determined by final judgment. Therefore, the final judgment did not adjudicate those property rights except as they may be adjudicated by operation of law. The court, upon the evidence, did

consider the husband assets in determining in alimony and child support to be paid by the husband.

Inasmuch as the ownership or property rights of the parties was the subject of actions pending in the Pennsylvania courts at the time of the final judgment of dissolution of marriage hereinabove referred to, this court does not deem it appropriate to determine whether said judgment divested the Pennsylvania court of its jurisdiction or otherwise acted as a bar to further proceedings there.

This court does have jurisdiction over the parties to determine whether an injunction should lie against the Defendant for, maliciously, for the purpose of vexing and harrassing the Plaintiff, prosecuting the actions in the courts of Pennsylvania and to and for that purpose, the court finds the Plaintiff's complaint states a cause of action.

Therefore, it is

ORDERED:

1. The Defendant's motion to dismiss the Plaintiff's complaint is denied.

2. Consistent with the findings hereinabove set forth, the court, on its own motion, strikes the following from the Plaintiff's complaint:

a. That portion of paragraph 5 which reads:

"A true copy of Plaintiff's Exhibit 1 filed in evidence, containing the legal description of the properties in Philadelphia, Pennsylvania, which were found and determined in said Final Judgment to be owned by Plaintiff, Charles Simon, (Plaintiff's Exhibit 1 was incorporated into the Final Judgment by reference) is attached hereto and marked Exhibit C."

b. Paragraph 6.

c. That portion of paragraph 8 which reads:

"which were adjudicated and concluded in the Final Judgment Dissolving Marriage entered on March 20, 1972, in the Circuit Court of Dade County, Florida."

d. Paragraph 10.

e. Paragraph 12.

3. The Defendant shall have 15 days from the date hereof to file her answer to the Plaintiff's complaint as amended.

4. The parties shall file the original of all pleadings with the Clerk of the Court and send copies thereof to the undersigned.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 16th day of October, A.D., 1973.

/s/ Major B. Harding
Judge

Copies: Jack D. Burris, Esquire
Attorney for the Plaintiff
420 Lincoln Road
Miami Beach, Florida 33139

Frank, Strelkow & Gay, Esquires

IN THE
DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

January Term, A.D. 1974 Case No. 73-1360

CHARLES SIMON, *Appellant*

vs.

SALLY SIMON, *Appellee*

Opinion filed April 2, 1974.

An Interlocutory Appeal from the Circuit Court for Dade County, General Jurisdiction Division, Major B. Harding, Judge.

Jack D. Burris, for appellant.

Frank, Strelkow & Gay and Richard N. Krinzman, for appellee.

Before BARKDULL, C.J., and HENDRY and HAVERFIELD, JJ.

PER CURIAM.

Plaintiff-appellant takes this interlocutory appeal to review an order by which the court on its own motion struck certain portions from plaintiff's complaint. We reverse.

On March 20, 1972 the chancellor entered a judgment dissolving the marriage between the parties. Contained therein was a specific finding of the court that the parties owned jointly as tenants by the entireties, the marital residence and, in addition, that the appellant, ex-husband, owned a number of properties consisting of improved and unimproved real estate in Philadelphia, Pa. which was

stipulated to have a net value in excess of $1,000,000 and from which appellant's actual income was in excess of $20,000 after deducting depreciation, a major portion of which appellant used to provide for his family. Thereupon, the chancellor ordered that the marital residence be sold and the proceeds from the sale thereof be divided equally between the parties, and that appellant pay monthly alimony to the appellee, ex-wife, and monthly child support. No appeal was taken from this judgment. Subsequent thereto, plaintiff-appellant filed a complaint in which he sought an injunction to enjoin his ex-wife, the defendant-appellee, from prosecuting seven separate actions involving his real property holdings in the Court of Common Pleas of Philadelphia County, Pennsylvania. Appellant alleged therein that the chancellor in the dissolution judgment made a finding of fact and an adjudication of property rights whereby appellant was found and determined to be the owner of the Philadelphia real property and as a result thereof, all property rights between him and his ex-wife finally have been determined and adjudicated; therefore, defendant-appellee is precluded and barred from claiming any special equities or other claim with respect to his Philadelphia real estate. In response thereto, defendant-appellee filed a motion to dismiss which was denied. However, the court on its own motion struck from the complaint portions of paragraphs 5 and 8 and paragraphs 6, 10 and 12 in their entirety which alleged that the final judgment of dissolution constituted a final adjudication of the property rights between the parties and barred any further litigation thereof by the defendant. Plaintiff appeals therefrom.

The rule is firmly established that as in the case sub judice where the court has acquired jurisdiction to adjudicate property rights, a final dissolution of marriage judgment settles all property rights of the parties and bars any action thereafter by either party to determine property rights. Finston v. Finston, 160 Fla. 935, 37 So.2d 423

(1948); Smith v. Bollinger, Fla.App. 1962, 137 So.2d 881; Jones v. Jones, Fla.App. 1962, 140 So.2d 318; McEachin v. McEachin, Fla.App. 1963, 154 So.2d 894; Thompson v. Thompson, Fla.App. 1969, 223 So.2d 95; Henderson v. Henderson, Fla.App. 1969, 226 So.2d 699; Vandervoort v. Vandervoort, Fla.App. 1973, 277 So.2d 43. In addition, property claims must be put into issue in the dissolution of marriage action since the doctrine of res judicata is applicable even where property rights are not put into issue, if the issue could have been raised. Finston, *supra;* Cooper v. Cooper, Fla. 1954, 69 So.2d 881.

After a close reading of the final judgment of dissolution, it is clear that the property rights of the parties conclusively were determined and settled therein. It is equally clear that the amount of alimony awarded the defendant-appellee, ex-wife, was predicated upon the court's finding that appellant owned the Philadelphia properties and the annual income he derived therefrom. Thus, we reverse the order striking the portions of appellant's complaint cited hereinabove and remand the cause for further proceedings not inconsistent herewith.

It is so ordered.

(Caption Omitted in Printing)

SUMMARY FINAL JUDGMENT FOR PLAINTIFF

This cause came on to be heard on Motion of Plaintiff, CHARLES SIMON, for Summary Final Judgment in the above case, upon the pleadings filed herein by Plaintiff and Defendant, the Affidavit of Charles Simon attached to the Motion, and Exhibits thereto and upon the Opinion and Order of the District Court of Appeal of Florida, Third District, which was rendered April 2, 1974, on an Interlocutory Appeal taken in this cause, and due consideration having been had,

The Court finds:

1. That the District Court of Appeal of Florida, Third District, has specifically ruled and adjudicated that all property rights of the parties in this cause were conclusively determined and settled in the Final Judgment Dissolving Marriage which was entered by this Court on March 20, 1972. That opinion of the District Court of Appeal specifically held that the Final Judgment Dissolving Marriage of the parties, aforesaid, was a bar to the seven actions described in Plaintiff's complaint, instituted by Defendant herein, against Plaintiff herein, in the Courts of the State of Pennsylvania, in which she claimed special equities and other property rights in the separate property of the Plaintiff herein, located in that State. The District Court of Appeal thereupon reversed the Order of this Court striking portions of the complaint and reinstated the Plaintiff's allegation alleging a bar and res judicata and remanded this cause for further proceedings not inconsistent with its order.

2. The affidavit filed in opposition to the Motion for Summary Judgment is insufficient to be considered by the Court.

3. The entry of this judgment is consistent with the Mandate of the Third District Court of Appeal.

4. There is no genuine issue as to any material fact in this cause and Plaintiff is entitled to a judgment as a matter of law.

WHEREUPON, it is ORDERED AND ADJUDGED as follows:

1. Plaintiff's Motion for Summary Final Judgment be and it is hereby granted.

2. Defendant, SALLY SIMON, her agents and attorneys, be and they are individually and severally permanently enjoined from prosecuting against the Plaintiff, CHARLES SIMON, any and all actions now pending in the Court of Common Pleas, Philadelphia County, State of Pennsylvania, or in any other Court of that state or in any other state, claiming or attempting to claim or assert any special equity or property interest in the real or personal property of the Plaintiff, CHARLES SIMON, located in the State of Pennsylvania, or elsewhere, where such claim is predicated upon facts or circumstances which existed on or before March 20, 1972, the date on which the Final Judgment dissolving the marriage of the parties hereto was entered; and it is further

3. ORDERED AND ADJUDGED that Defendant, SALLY SIMON, be and she is hereby ordered and directed forthwith to cause, as to the Plaintiff, CHARLES SIMON, the dismissal with prejudice of all actions now pending against him in the Court of Common Pleas of Philadelphia County, State of Pennsylvania, wherein she is Plaintiff and wherein she claims or asserts any special equity or property right in real or personal property, now or heretofore owned by Plaintiff, CHARLES SIMON, in the State of Pennsylvania or elsewhere; and it is further

4. ORDERED AND ADJUDGED that the Defendant, SALLY SIMON, shall file in this cause and serve upon Plaintiff's counsel, proof of the dismissal of all actions herein required to be dismissed by her within 30 days from this date.

DONE AND ORDERED at Jacksonville, Duval County, Florida, this 24th day of October, A.D. 1974.

/s/ Major B. Harding
Circuit Judge

Copies: Jack D. Burris, Esquire
420 Lincoln Road
Miami Beach, Florida 33139

Daniel Neal Heller, Esquire
Suite 1205 Ainsley Building
14 N.E. 1st Avenue
Miami, Florida 33132

IN THE
DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

July Term, A.D. 1975 Case No. 74-1692

SALLY SIMON, *Appellant*

vs.

CHARLES SIMON, *Appellee*

Opinion filed July 29, 1975.

An Appeal from the Circuit Court for Dade County, Major B. Harding, Judge.

Heller & Kaplan, for appellant.

Jack D. Burris, for appellee.

Before PEARSON, HENDRY AND HAVERFIELD, JJ.

PER CURIAM.

The defendant, Sally Simon, appeals a summary final judgment which enjoined her from proceeding with actions against her former husband, Charles Simon, in the courts of the State of Pennsylvania. The trial judge correctly determined that under the facts before him upon the pleadings and affidavits submitted and the law of the case as established in Simon v. Simon, Fla.App. 1974, 293 So.2d 780, the plaintiff was entitled to the injunction sought.

Affirmed.

September 11, 1975

A18

(Caption Omitted in Printing)

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

/s/
Clerk, District Court of
Appeal, Third District

cc: Heller & Kaplan
Jack D. Burris

/h

(The Mandate in the Above Styled Cause Has Today Been Issued and Mailed to the Clerk of the Circuit Court in and for Dade County, Florida)

March 10, 1976

A19

(Caption Omitted in Printing)

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ROBERTS, Acting Chief Justice, BOYD, SUNDBERG and HATCHETT, JJ., Concur
ADKINS, J., Dissents

A True Copy

TEST:

/s/ Sid J. White
Clerk Supreme Court

TC

cc: Hon. William P. Carter, Clerk
Hon. Major B. Harding, Judge
Hon. Richard P. Drinker, Clerk
Lynn Richard Mattaway, Esq.
of HELLER & KAPLAN
Jack D. Burris, Esq.